IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A. D. 1903.

No. 219.

THE CREEDE AND CRIPPLE CREEK MINING AND MILLING COMPANY,
Petitioner,

vs.

THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY,
Respondent.

Certiorari to the United States Circuit Court of Appeals. For the Eighth Circuit.

BRIEF AND ARGUMENT ON BEHALF OF THE RESPONDENT, THE UINTA TUNNEL MINING AND TRANSPORTATION COMPANY.

STATEMENT.

In addition to the statement contained in the brief for petitioner, and in addition to some important corrections therein, which it is necessary to make in order that said

statement may conform to the record in important particulars, the respondent makes the following:

The respondent, defendant in the Circuit Court, in its answer, defended upon the grounds that its tunnel site location was superior to the alleged lode mining claims locations relied upon by the plaintiff in this: that while the petitioner, plaintiff below, alleged that its lode mining claims had been located on January 2, 1892, they were not in fact at that time located, nor was a discovery or location thereof, made until after the location of the respondent's tunnel site; that the petitioner and its predecessors had allowed the respondent, a tunnel company, under a claim of right openly manifested and well known to them, to expend over $125,000 in the development of its property in the matter of running its tunnel, and to pass through the lode claims claimed by the petitioner, having at all times full knowledge of the acts of the respondent, of its claim of right, its possession and entrance into said ground through the bore of its tunnel, and the large expenditure which it was making in reliance upon this right, and made no objection thereto, but in fact consented and acquiesced therein until after the expenditures had been made and until after the discoveries of the blind lodes had been made by the respondent through the extension of its tunnel in accordance with the provisions of Section 2323, U. S. Revised Statutes, and were therefore estopped from setting up or claiming that respondent had been guilty of a trespass, and from denying a right of way to the plaintiff in error through its said tunnel, or to prevent the use thereof in its further extension and in the operation of its mining working upon the veins cut therein; that the owner of a tunnel site location made under Section 2323, U. S. Revised Statutes to a lode mining claim on the line or the bore of the tunnel, and which had discovered, in accord-

ance with the Statutes of the United States, certain blind lodes upon the line of the tunnel, and by means of the extension thereof, had a right of way through any intervening lode claims, especially those legally discovered and located after the location of the tunnel site, for the purpose of development and mining in and upon the veins so discovered, located, and owned by it upon the line of its tunnel; that the date of the location, and the date of discovery and patent of lode mining claims, which are not a part of, or disclosed in and by the patent, are in no manner established by the patent, and that although a patent may relate under the circumstances of a particular case to the date of the location or the date of discovery, yet when such date is not disclosed by the patent, it must be established by proof *aliunde* the patent, and this may be done by either party to the action when they have not been the contesting parties in an adverse suit, or under the law were not required to be parties thereto. The facts set forth in the answer upon which these positions were based, are set forth in detail and are well pleaded. Upon motion, these facts were stricken from the answer, and at the trial evidence offered in support thereof was excluded. Thereupon three leading, material and comprehensive errors appeared in the record, were set up and relied upon:

First—The error in relation to the defense of estoppel which was pleaded in the sixth paragraph of the answer to the plaintiff's complaint (printed record, page 38); also in paragraph fourteen of the answer (printed record, page 40). An offer was made to prove knowledge and acquiescence by the petitioner to the acts alleged to constitute an estoppel in connection with the expenditures, claims and assertions of title of the respondent, but the same was, upon objection of the petitioner, excluded (printed record, page 88). The respondent presented to the Court its claims as

to said estoppel in a request for an instruction known as "Defendant's Instruction No. 1," set forth at page 144, printed record, which instruction was refused. To these several actions or rulings of the Court, proper exceptions were reserved.

Second—The error in relation to a right of way to the tunnel site is disclosed and fully manifested at page 89, printed record, paragraphs 10 to 22 of the answer (printed record, pages 59 to 69); in the offer of testimony (printed record, pages 85-89).

Third—The error in reference to which a date in a patent might relate is set forth in the pleadings (printed record, page 58), and with reference to the offer of testimony in support of the allegations of the answer (printed record, page 86), and as to the instruction asked based thereon (Instructions No. 2 and No. 3, printed record, pages 144-5).

The controversy at the trial and presented to the Circuit Court of Appeals was between the locator of a tunnel site with all the appurtenant rights thereof, in pursuance of Section 2323, U. S. Revised Statutes, and the owner of patented lode mining claims lying within the boundaries, as defined by statute, of the tunnel site location. The alleged rights of the petitioner, and upon which it relied at the trial, are claimed to have been obtained by virtue of a United States patent for the Ocean Wave and Little Mary lode mining claims, dated December 21, 1893. The rights of the respondent are based upon the location of the Uinta Tunnel site, located on the 13th day of January, A. D. 1892, and by virtue of a full and complete compliance with the Statutes of the United States and of the State of Colorado, and of all rules and regulations and requirements having reference to the location, maintenance and development of tunnel site locations. Petitioner's patent, though

issued on December 21, 1893, was based upon an entry for patent the 5th day of August, A. D. 1893, which fact appeared in and by the patent. Petitioner claims that this patent related necessarily and absolutely to the date of the alleged original location of the Ocean Wave and Little Mary lode mining claims, claimed to have been made on the 2d day of January, A. D. 1892, eleven days prior to the location of the tunnel site. There was no controversy as to the fact that the tunnel site was duly, properly and legally located on the 13th day of January, A. D. 1892, or that all work required by the statute and all requirements of the laws and regulations either of the United States or of the State of Colorado, or the mining district in which the same was located, had been fully and completely performed and made with reference to the tunnel, and that the respondent was at the time of the trial in possession of all rights which belonged or could belong by virtue of the statutes of the United States and the State of Colorado, to a tunnel site location and to a tunnel located in strict conformity with the provisions of Section 2323, U. S. Revised Statutes. The tunnel had been maintained with diligence and in the actual possession of the respondent and its grantors from the date of its location to the date of the trial, and was then a valid existing tunnel site. After the location of the tunnel site, and during the progress of the extension of the tunnel and work thereon, the following blind lodes, or lodes not outcropping at the surface, were discovered in the tunnel, and location thereof properly and legally made in accordance with the requirements of the United States Statutes and Statutes of the State of Colorado, and the local rules and regulations of the mining district in which they were situate, to wit: Uinta Tunnel No. 23, on the 18th day of December, 1897; Uinta Tunnel No. 24, on the 23d day of January, A. D. 1897; Uinta

Tunnel No. 25, on the 6th day of January, A. D. 1898; and Uinta Tunnel No. 26, on the 5th day of December, 1898. The location certificates for these several locations relate back in date to the location of the tunnel site, and as set forth in the printed record, page 138. After making the offer to prove by competent testimony the discovery of these several blind lodes Nos. 23, 24, 25 and 26, the location certificates thereof were offered in evidence (printed record, pages 131-6). The respondent also was the owner of an unpatented lode mining claim called the Black Jaspar, located on the 30th day of January, A. D. 1897 (printed record, page 140). Respondent offered to prove said location by competent evidence, which said evidence was excluded upon the objection of petitioner, as will be found fully set forth in the record. (Printed record, pages 79 80, 81, 85).

The claims of the petitioner lie between the portal or entrance of the tunnel and the breast thereof, between the portal of the tunnel and the blind lodes Nos. 23, 24, 25 and 26, and the Black Jaspar, owned by the respondent, and beyond the line of the bore of the tunnel. It is claimed by the respondent, and expressly pleaded in its answer, that the alleged discoveries claimed to have been made on The Little Mary and Ocean Wave lode claims, and which constituted the origin and basis of all title thereto, were not in fact made until long after the location of the Uinta Tunnel Site, and that the claim of the petitioner that these lode mining claim locations were prior in point of time, or superior in matter of right to the location of the tunnel site, is not true, but that on the contrary no location thereof was made and no discoveries thereon until after the location of the tunnel site, and that hence the tunnel site is in fact prior in point of time of location to the date of the location of the lode

claims, and both thereof, and was therefore as a matter of law, superior thereto, and under the conditions existing at the time, that the petitioner applied for and received patent, the owner of the tunnel site was not required or permitted under the law to adverse the same, and is in no wise concluded by the issuance of that patent as to any matter in conflict between the two, and especially is not estopped or concluded so that the petitioner may introduce evidence as to the date of the location of said lode mining claims and have the patents relate back to said date, while at the same time there shall be excluded the offer of evidence and the filing of pleadings on behalf of the respondent denying the priority of the discovery and location, and proving that instead of the location of the lode mining claims having been made prior to the location of the tunnel, the exact reverse is the case.

The Circuit Court of Appeals, on a hearing of this cause, and after a full presentation of the respective claims of the petitioner and respondent, held against the contention of the petitioner and the construction sought by it to be put upon the position of this Court in the case of Calhoun G. M. Co. vs. The Ajax G. M. Co., 182 U. S., 491. The decision of the Circuit Court of Appeals is reported in 119 Federal, 166 and is set forth in the printed record herein at pages 178-185.

ASSIGNMENT OF ERRORS.

The four assignments of error presented by the petitioner, and set forth at pages 9-10 of its brief, do not in fact assign errors upon things really done by the Circuit Court of Appeals, but contain arguments with reference to the positions alleged to have been taken, and decisions al-

leged to have been made by the Circuit Court of Appeals, but which in fact were not taken or made. They contain sweeping assertions to the effect that the Circuit Court of Appeals has rendered a decision in violation of the decision of this Court in the Calhoun-Ajax case, and the unnamed decisions of this Court construing Sections 2322 and 2323, U. S. Revised Statutes. An examination of each of these alleged assignments of error will find that it is either an accusation or an argument, and in no wise an assignment of error or presentation of the real decision of the Court below and the claim of error as to the same. They are in effect, we maintain, perversions of the facts with which the Circuit Court of Appeals dealt in its decisions and of the decision actually rendered. It is contended in petitioner's brief as a summary of the various alleged errors complained of, that the Circuit Court of Appeals refused to accept or apply the decisions of this Court, and announced and applied a doctrine in conflict therewith, whereas, in fact in a clear, luminous and conclusive exposition of the controversies of that case, and application of the principles of law as announced by this Court pertinent thereto, that Court demonstrated that its decision was in no wise in conflict with the decisions of this Court, but was in perfect harmony therewith.

It is true that Judge Sanborn, speaking for the Court, pointed out what he claimed to be, and what is, a fundamental distinction between the case at bar and the Calhoun Company vs. Ajax Company, to wit: that in the case last mentioned, the tunnel location of the Calhoun Company was made after the entry, and substantially the patent of the Ajax lode mining claims had passed, when the territory had ceased to be public domain, and was no longer subject to location as a tunnel site, while in the case at bar, a tunnel site location was, as shown by the portions of

the answer, stricken out, and by the evidence offered, senior in time and prior in right to the lode mining claims, located, and had been located, not only before any title or right of any kind had been initiated upon the same, but while it was unoccupied public domain subject to location under the tunnel site statutes. Counsel for petitioner, throughout the brief they have filed, constantly assert that the lode mining claims were first located, and that the Circuit Court of Appeals, in its decision, ignored this fact. The exact reverse is the situation. It is a rule without conflict of authority, that in determining the effect to be given to a pleading, to an offer of testimony, and whether they shall be accepted or rejected, it is to be assumed that the allegations of the pleading are true, and that the evidence will establish the facts in accordance with the offer. It having been pleaded by the defendant that its tunnel site location was made prior to the lode location, it being denied in the answer that the lode locations were made prior to the tunnel site location, in determining the materiality and sufficiency of these allegations, it must be taken as true as a matter of fact that the tunnel site location was prior in date of location and superior in matter of right to the date of location and the rights of the lode mining claims. The same position must be accepted as true with reference to the effect, correctness and force of the offer to introduce and the exclusion of evidence. The position of the respondent and the determination of the Circuit Court of Appeals was not that in a case wherein lode mining claims had been properly and legally located, so that they were valid and in full force and effect at the time of the location of the tunnel site, and thereafter a patent for the lode mining claims had been duly issued, the patent would not upon the establishment of these facts, by proper testimony relate to the location, the real substantial

location of the claims. That question was not the question presented and determined. The petitioner alleged in its complaint (printed record, page 34), that the lode claims were located on the 2d day of January, 1892. It alleged that its patent was issued on the 2d day of December, 1893, and that entry had been made on the 5th day of August, A. D. 1893 (printed record, pages 34, 92, 94 and 127). These allegations were put in issue. There was nothing in the patent to show that it related back to a date earlier than August 5, 1893. The petitioner undertook to extend the patent and to secure the operation of the equitable doctrine of relation, to the destruction of the rights of the respondent, by proving *aliunde* the patent, that in fact the lode mining claims had been located on the 2d day of January, 1892. The petitioner did not believe, nor rely upon the claim that in and by the patent itself, the date of location was established and established so conclusively that it should not be the subject of inquiry or evidence. It alleged a location and sought to prove it, offering evidence utterly inadequate and insufficient for that purpose under multiplied decisions upon the subject. The respondent undertook to meet this allegation and this inadequate proof by the answer to the effect that the location was not made at the date alleged, and that a discovery which is the essential element and primary basis of every location, as provided by the statutes of the United States, and held by this Court, was not in fact made until long after the location of the tunnel site, and therefore, under the rule relative to the doctrine of relation, the patent could not relate back to January 2d, nor to any time prior to January 13, 1892, the date of the tunnel site location.

It is to be observed that the tunnel site location, as it is pleaded by the respondent, and as would have been established by the evidence offered in support thereof, was lo-

cated in such a way as to be superior to any claim or right not existing at the time of its location or arising during its extension; and that in the progress thereof, blind lodes were discovered, to the possession of which it became entitled, and the ownership of which became vested in it; and that the claim of the petitioner is, that if A. locates a tunnel site and pursues the work thereon in complete compliance with the statutes governing the same, but should not in the first four or five hundred feet thereof discover blind lodes, but should discover them further in upon its tunnel, and at a depth of thousands of feet from the surface, rendering it impractical to operate or mine the same save through the tunnel, and if B. should locate lode mining claims thereafter across the bore of the tunnel and between the portal thereof and the position of the blind lodes, and apply for patent which, since no lodes had been discovered within that portion of the tunnel crossing these lodes, A. would not be permitted or required to adverse; and when a patent should be issued therefor, it would be assumed to be superior and anterior in initiation of right to the tunnel site location, and instead of the lode mining claims being taken and held subject to the right of way for the tunnel, that the tunnel would as to this territory, become the property of B., who would thereupon dismember the right of A. in his tunnel and prevent the use thereof. In other words, that the tunnel right, though prior and perfect, is absolutely as to every part thereof in which a blind lode is not located and discovered thereby invalidated; that if after its initiation and during its progress, and while it is perfect in its legal force, someone makes a lode location across the course of it, and so makes it that the owner of the tunnel is neither authorized nor permitted by adverse proceedings to challenge the right, the tunnel rights are destroyed. Authority from the letter or spirit of the statute, or by the

terms of any decision will be sought in vain establishing this inequitable and unjust result.

Recognizing the necessity of putting the case in a different position from that which it occupied before the Circuit Court of Appeals, and of removing the foundation for the flawless logic of the Circuit Court of Appeals resulting in a reversal of the case, counsel have taken issue with that Court as to certain allegations stated by Judge Sanborn in delivering the opinion of the Court to be contained in the answer. This is a matter of importance; is the subject of frequent remark and assertion by counsel, and is, it may be said, controlling in its effect. We therefore inquire as to who is correct, counsel or the Court, in this dispute. Judge Sanborn in the opinion has said:

"When the claim to a tunnel site has been located before the entry of the conflicting lode mining claims which have subsequently passed to patents, is the question, whether discoveries of mineral in rock in place were made within the lode claims before the location of the claim to the tunnel site, open to determination by means of evidence or testimony *de hors* the patents? This is the principal question presented by this record.

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119 Fed., 166.

"This is not the case in the action before us. The claim to the tunnel site was located on January 13, 1892. The judgments of the Land Department allowing the entries were rendered on August 5, 1892 ('93). At that time there were three parties interested in the land—the lode claimants, the United States and the claimant of the tunnel site. Two of these parties, the lode claimants and the United States, were parties to the proceedings and were estopped by the judgments and the patents. One of them was not a party to any of these proceedings, to the judgments or to the patents and, upon familiar principles, was neither bound by them nor estopped by them from present-

ing and proving according to the established rules of evidence in trials under the common law the fact that no discoveries had been made on the lode claims *before the location of its tunnel site,* the fact essential to the validity of its claim upon, and interest in the land.

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119 Fed., 168.

"The question here is whether or not discoveries were made in the lode mining claims prior to January 13, 1892, the date of the location of the claim to the tunnel site.

* * * * * * * *

"Notwithstanding all these considerations, counsel for the plaintiff insist that the defendant is estopped from pleading and proving that no discoveries of mineral in place were made in the lode claims before the location of the tunnel site on January 13, 1892, because certificates of location of the lode claims were filed on January 2, 1892.

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119 Fed., 169.

"Moreover, the averment of the defendant is that no discoveries were made in the lode claims until after the location of its claim to the tunnel site.

* * * * * * * *

"The averments that no discoveries of mineral in place within the lode claims had been made before the location of the claim to the tunnel site should not have been stricken from the answer of the defendant and its evidence to sustain them should have been received."

119 Fed., 171.

Counsel for petitioner, in their brief referring to the statement of Judge Sanborn, last quoted, say, at page 14:

"There is no such averment in the answer, either as originally filed or as subsequently reformed through the motion to strike, as mentioned by the Court."

And at page 15:

"That part of the affirmative answer, upon the allegations of which an affirmative judgment was prayed by the respondent, makes no reference to the petitioner's location or discovery, but pleads its own title to the tunnel and to the veins discovered therein, together with a right of way through petitioner's mining claims under the Federal and State Statutes for the operation thereof."

Page 16:

"It is possible that if the answer had contained a general denial of the allegations of the plaintiff's complaint, a liberal construction would have justified the statement quoted from the opinion; but even that, as we have seen, is absent from the answer. As a question of pleading, therefore, and without reference to any other consideration, testimony concerning the want of discovery in the plaintiff's claims was properly rejected."

Page 30:

"His Honor, again misquoting the averments of the respondent, 'that no discoveries were made in the lode claims until after the location of its claim to the tunnel site,' argues that 'if this allegation is true, it may be doubted whether the lode claims can be said to have been initiated before the claim to the tunnel site was located,' and then cites a number of authorities in support of the proposition that there can be no location of a mining claim until the discovery of a vein within its limits. The 'allegation' can not be true, because the averment does not appear in the pleadings, * * * and the argument of the Circuit Court of Appeals again fails."

To ascertain which is right in this dispute, court or counsel, we appeal to the record and quote:

Printed Record, page 37:

"It further alleges that said Ocean Wave and Little Mary Lode mining claims were not, nor were either of them, located upon any discovery vein or veins, and that no mineral vein whatever was ever discovered or uncovered

in the discovery shaft of said Ocean Wave Lode mining claim or of said Little Mary Lode mining claim."

Printed Record, page 48:

"Twenty-first. It further avers * * * that the pretended discovery alleged and pretended to have been made in and upon said pretended Ocean Wave and Little Mary lodes and lode mining claims, and by virtue of which the plaintiff claims the right to patent the same under the laws of the United States, was not made until long after the location of said Uinta tunnel, and at the time said pretended locations were made, said locators thereof were advised and knew that said tunnel had been located and had been and was being prosecuted with due diligence and in strict compliance with the terms and conditions of the Statutes of the United States and of the State of Colorado which authorize and provide for the location and prosecution of such tunnel, and which defines and determines the rights pertaining thereto; and that said pretended Ocean Wave and Little Mary lode mining claims, so far as the same may be now claimed and possessed by said plaintiff, were taken and held subject to the rights of this defendant as owner of said Uinta Tunnel, located in accordance with Section 2323, U. S. Revised Statutes," etc. * * *

From which it appears that Judge Sanborn is correct as to his statement of what was averred in the pleadings, and counsel are mistaken, and have based the major part of their contention and their assault upon and criticism of the decision of the Circuit Court of Appeals, upon their misapprehension of or failure to read a portion of the answer with which it is apparent that Judge Sanborn was quite familiar.

It is almost impossible, and we apprehend would be an utterly useless task, to pursue in detail through the brief of counsel for petitioner the statements of what it is alleged was decided by the Circuit Court of Appeals, what was assumed by that Court, and the alleged action of that

Court in holding that a junior tunnel site location could assail and invalidate a patent for prior located lode mining claims. A little mental paralleling of the real utterances of the Circuit Court of Appeals and the assertions of counsel for petitioner as to what those rulings were, will disclose the misapprehension of that decision, which has controlled and excited counsel in the preparation of their brief. May we not suggest that it is demanding no more than is proper to ask counsel when they make the decisions of the Court the target of their wit, their satirical shafts, and their condemnation, to first read and know what the Court has in fact said and decided? In the present instance it would seem that had such a course been pursued, counsel would have at once recognized that the decision of the Circuit Court of Appeals was eminently proper, whatever might be their opinion of that imaginary decision which the vivid fancy of counsel has created, and which they have presented to this Court for its consideration.

THE PATENT.

For the purposes of this brief and argument, we shall discuss first, the force and effect of the patent under consideration, its conclusiveness, and the date to which the same under the authorities relates, and the testimony by which that date is to be established, and which on behalf of the respondent may be introduced for the purpose of its ascertainment. These are the paramount and engrossing questions presented by this record, and if the contentions of counsel for the respondent are correct, are conclusive and determinative of the matters brought here upon this *certiorari*.

The contentions and views of counsel for the respondent cannot be better or more simply expressed than by presenting them in the concrete form they assume in instructions numbered 2 and 3, requested by the respondent at the trial of the cause, and which upon the objection of the petitioner, and over respondent's exception, were refused. They are as follows:

"The Court instructs the jury as a matter of law, that there can be no location of a mining claim upon the public domain until there has been a discovery of mineral thereon. The simple driving of a location stake, the marking of the claim, upon the ground, the survey making a location certificate and recording the same, is not sufficient. Until a vein in rock in place has been discovered. there is no valid discovery and no valid location can be made until such discovery. If the jury believe from the evidence in this case that the plaintiff or its grantors, had not made a discovery of mineral in its Little Mary and Ocean Wave lodes, prior to the location of the tunnel claimed by defendant, and you further believe from the evidence that the said tunnel, from the time of its location was being prosecuted with reasonable diligence, and that there was no failure to prosecute work on the tunnel for a period of six months, until after defendant was enjoined from working its said tunnel; that the work on said tunnel was continuous, then and in such case you will find for the defendant.

"If the jury believe from the evidence that there was no discovery of a vein of mineral in rock in place, made in the Little Mary and Ocean Wave lodes, or either of them, until after the location of the tunnel claimed by defendant, then and in such case it was not necessary, when application for patent for said Little Mary and Ocean Wave lodes, or either of them, was made for the owners of the tunnel, if such owners had not at that time reached the westerly side line of the Little Mary with the bore of its tunnel, to file an adverse claim in the United States Land Office and to commence a suit in support thereof to preserve the rights of such owners to the said tunnel."

The petitioner's position at the trial, which was adopted by the trial court, may be summarized thus: The Ocean Wave and Little Mary are patented claims, the patent for which bears date December 21, 1893, but for the purpose of determining the rights of the parties hereto, relates back to the original location, which it is claimed by the petitioner is January 2, 1892, and this fact is proved by the introduction of the location certificate of the two claims and the amended location certificates thereof, which were offered and admitted in evidence. It is to be observed that the patent itself is silent as to the claimed original date of location, but sets forth that entry was made of the claims on the 5th day of August, A. D. 1893. It is not the purpose of counsel for the respondent to contend against the validity or conclusiveness of patents of the petitioner within their proper scope and sphere, or within the well-defined limits of the extent thereof as settled by this Court, and there is probably no better time for us to eliminate from this controversy clearly any doubt as to the position of the respondent on this point. It may be admitted that patents to mining claims cannot be collaterally attacked, that they are within certain limits, which will be hereafter mentioned, conclusive upon all parties thereto, or to the proceeding under which they were issued, or who by intendment of law were parties thereto.

The respondent maintains (*a*), that under the circumstances of this case, it is under, and within the decision of this Court in Enterprise Mining Company v. Rico-Aspen Mining Company, 167 U. S., 104, and was not only under no duty or obligation to adverse the application for patent made by the petitioner for its two lode mining claims, but that it had no right to do so, and was not permitted to do so.

(*b*) That being thus under no duty, and having no right or opportunity to adverse the application for patent

as above stated, the question of priority of location between the lode mining claims and the tunnel site was not adjudicated, was in no manner evidenced or concluded by the patent, and was properly the subject of proof as any other fact, by such testimony as would be proper under the rules of evidence. It may be stated that there are certain locations of lode mining claims made through the instrumentality of a tunnel site location and the extensions of a tunnel thereon, which require that the locator shall institute adverse proceedings against other independent locations or claims, as for instance, where both lode locations cover the same territory, and the one location is based upon the discovery of a blind lode made in a tunnel, and the other upon the discovery of an out-cropping vein upon the surface, it being quite possible that there may be within the boundaries of a claim fifteen hundred feet in length by three hundred feet in width both outcropping and blind lodes. In such a case, should a tunnel lode claimant fail to adverse the application for patent of the out-cropping lode claim, there might be ground for contending that all matters would be concluded between the two in the same manner as though there had been an actual adverse contest.

There are other instances, among which is the one here presented, where it would be a useless, a vain, and an impossible thing for the tunnel site locator to adverse patents for lode claims against which the tunnel claimants at the time of the application for patent either had no adverse rights, or with reference to which they were under no legal or other obligation to present them. In this case there had been within the territory now involved, no discovery of a blind lode in conflict with the claims of the petitioner at the time of the application for patent by the respondent which would have entitled it to file an adverse, nor are the rights here in dispute of such a nature

that had they existed at the time of the application for patent, the tunnel site locator would have been entitled to file an adverse and assert the same. There was no more duty upon the tunnel site locator to file an adverse than there would have been between two lode claimants who, having no conflict of surface area, and knowing of no underground conflicts, respectively apply for their patents and afterwards became involved in litigation over the right to a vein below the point of union when their veins contained in the respective separate locations had united upon their dip. It would be the source of endless, fruitless, and needless litigation if it should be possible or required, that a lode claimant, where there was no conflict of any surface boundaries, upon suspicion that there might in the course of years and development arise a conflict over the union of the veins upon the dip, have the right or be under the duty to enter upon the tedious, expensive, and vain labor of an adverse suit with all of his neighboring lode claims. This question has been authoritatively adjudged in many decisions.

Lindley on Mines, Vol. 2, Sec. 730;

Champion M. Co. v. Consolidated Wyoming M. Co., 75 Cal., 78;

Eureka Case, 4 Sawyer, 302;

Kahn v. Mining Co., 2 Utah, 188;

Last Chance M. Co. v. The Tyler Mining Co., 61 Fed., 557.

That there was no duty upon a tunnel claimant to file an adverse against a lode claimant such as the one here in controversy, before a blind vein had been discovered by the tunnel site locator, has been settled by this Court in Enterprise Mining Company v. Rico-Aspen Mining Com-

pany, 167 U. S., 104. This decision is authoritative, is met by no conflict of authorities, and is amply sustained by the reasoning therein contained and the authorities cited. The decision was rendered by Mr. Justice Brewer. The conflict was between the Vestal lode claim, a surface location, and the Jumbo No. 2, a blind lode discovered in a tunnel, and this latter claim being discovered in point of time later than the Vestal. This Court, with reference thereto, says:

"The remaining question is whether the failure to 'adverse' the application for a patent for the Vestal claim destroyed or impaired the rights of the defendant. We think not. United States Revised Statutes, Sections 2325, 2326, contain the legislation in reference to adverse claims.
* * *

"Now, at the time the application for patent to the Vestal claim was presented and the proceedings had thereon, the defendant knew of no vein which would enable it to dispute the right of the owners of the Vestal to a patent. The Vestal claim, it will be preceived, runs parallel to the line of the tunnel, and is distant therefrom some 500 feet. The presumption, of course, would be that the vein ran lengthwise, and not crosswise, of the claim as located, and such a vein would not, unless it radically changed its course, cross the line of the tunnel. Whether it did or not, or whether any other vein should be found in the tunnel which should cross the territory of the Vestal, was a matter of pure speculation, and there would be no propriety in maintaining a suit to establish defendant's inchoate right and delay the Vestal claimants in securing a patent, on a mere possibility which might never ripen into a fact. The obvious contemplation of the law in respect to these adverse proceedings is that there shall be a present, tangible, and certain right, and not a mere possibility. Of course, the owners of the Vestal claim had notice, from the fact of the location of the tunnel line, of the possibilities which future excavations of the tunnel might develop, and so they were not prejudiced by the failure to 'adverse.' And as the de-

fendant could not, in any suit which it might institute, establish a certain adverse right, and as litigation in the courts is based upon facts, and not upon possibilities, it seems to us that nothing was to be gained by instituting adverse proceedings, and therefore nothing lost by a failure so to do."

Take the analogy between the facts set out in this opinion and those in the case at bar, and we may with equal propriety ask, what right was possessed by the respondent in this case, at the time of the application for patent by the petitioner, which would have entitled respondent to institute an adverse proceeding? No blind lode was discovered, a location upon which would in any wise conflict with the patents of the petitioner. The only possible ground upon which it can be contended that there was a duty upon the respondent to adverse, is that, wherever there is a possibility that the rights of two parties will depend upon a priority of location, regardless of the conflicts in territory, it shall be the duty to institute an adverse proceeding for the determination, at the time of the issuance of the patent, of their relations as to priorities.

It is clear that locations may be made subsequent to the location of a tunnel site, and within its boundaries, upon veins which outcrop upon the surface and which are known. A tunnel site can under no circumstances, include or obtain title to such a lode, any more than the owner of a placer can obtain patent to such a known vein without specifically applying therefor. It is excluded by law, and the right to locate thereon is as much granted to the prospectors upon the public domain, as the right to enter upon any open domain of the Government.

(*b*) At page 68 of the Printed Record, in paragraph twenty-first of the respondent's answer, which was

stricken out as a whole upon the motion of the petitioner, it is alleged that at the time of the location of the tunnel site by the respondent, there had not been a valid discovery of mineral in either of the claims of the petitioner, but that said discovery, if any, was subsequent in point of time to the tunnel location.

It is the contention of the petitioner that, by the decision in The Calhoun Gold Mining Company v. The Ajax Gold Mining Company, 182 U. S., 499, the matter of the date of discovery, or of location, is not open for the introduction of evidence or determination, but is concluded by the patent itself. The position of the petitioner upon this point is somewhat contradictory, for, although stoutly maintaining this right by assertion, no reliance is placed upon it, either in the pleadings or in the proof. In the pleadings, in the fourth paragraph of the amended complaint (Printed R., p. 34), the title of the petitioner is based upon the patent to the two claims. But in paragraph fifth (Printed R., p. 34) there is an allegation of fact, which is entirely outside of the patent itself, to wit: that the Little Mary and Ocean Wave claims were located on the second day of January, 1892. At the trial of the case the petitioner was not content to rest upon the introduction of the patent, but as proof of a date to which the patent should relate, introduced the original location certificates of the two claims, and the amended location certificates (Printed R., p. 75). This was done over the objection of the respondent, that the location certificate itself was not proof of a discovery. Did the petitioner load both the pleadings and the proof of the trial of this case, with surplusage, or was there a necessity for both the pleading and the proof in this respect? That there was such necessity cannot be disputed. If it was neces-

sary for the plaintiff to allege, as a distinct matter, the date of the discovery, and to prove the same, it certainly was competent for the defendant to deny such discovery, and, by such proof as it might adduce, to meet any evidence of petitioner in respect to the date of location.

The title by patent issued upon the relocation of a mining claim does not relate back to the original location, if that was invalid; and, when it becomes material, evidence of the invalidity of the original location is admissible for the purpose, *not of impeaching the patent*, but of determining the time to which such title relates.

Fisher et al. vs. Seymour et al., 23 Colo., 542.

There is no doubt that generally the rights of a patentee, to property obtained from the government, relate back beyond the date of the patent. What this time is has been disputed and varies in different cases. Lindley on Mines, Vol. 2, page 975, states the rule as follows:

"It is accepted as a well established rule of law, that the title conveyed by a mining patent relates back to the inauguration of the right; that is, to the location upon which the patent proceedings are based."

Citing as authority therefor:

Haydenfeldt v. Daney G. & S. M. Co., 93 U. S., 634;

St. Louis Smelting Co. v. Kemp, 104 U. S., 636;

Deffebach v. Hawke, 115 U. S., 392, 405;

Silver Bow M. & M. Co. v. Clark, 5 Mont., 378;

Talbot v. King, 6 Mont., 76;

Smokehouse Lode Cases, 6 Mont., 397;

Deno v. Griffin, 20 Nev., 249;

Eureka Case, 4 Saw., 302;

Kahn v. Old Tel. Co., 2 Utah, 174.

Barringer and Adams on the Law of Mines and Mining in the United States, at page 417, state their conclusions as follows:

"The patent being simply the evidence of the grant, when it had been issued, takes effect by relation as of the first initial step in the acquisition of the title, that is, the original location, at least so far as to cut off intervening rights, unless they be such that the patentee has lost the right to question them by reason of his failure to file adverse claims, as required by Rev. Stats. 2325. Where such rights exist, the relation is to the date of the issuance of the certificate of entry. The date of location may be stated in the instrument, or may appear in the record of the entry in the department and may be thus established, or it may be otherwise proven.

"Where successive steps are essential to perfect title, as discovery, location, record, application for patent, entry and finally patent; and during the progress of the time required to complete the series two hostile parties have taken some or all of these steps towards obtaining title to the same ground—the doctrine of relation may become material to determine between them the question of priority.

"Where discovery is followed by location and record within the proper or fixed periods allowed and entry and patent follow in due course, the title is considered in general and in theory to relate back to discovery. This theoretical relation is, of course, of no materiality unless a second title has intervened, and if a second title has intervened at a period when the first title was in default, the doctrine of relation does not apply, or rather it favors the second title."

Morrison's Mining Rights (Eleventh Edition) page 129.

"Even if suspected, such union would rarely be provable in time to support an adverse claim, and even if known an adverse claim could not be brought because an adverse is allowed only where there is a surface conflict. —6 L. D. 320. The doctrine of relation back to discovery, therefore, applies, but the date of discovery and of the respective acts of location are open to parol proof. If the union becomes known or comes in contest, as it generally does after both lodes are patented, there exists a presumption in favor of each that it had a valid discovery and location at the date of entry, but there is no conclusive presumption that the date of discovery or of location claimed by the recorded location certificate upon which the patent issued is the true date. St. Louis Co. v. Kemp, 11 M. R., 673; 2 Lindley, Sec. 730; Last Chance Co. v. Tyler Co., 61 Fed., 557."

Morrison's Mining Rights (Tenth Edition) page 149.

Whether, then, the patent, when issued, relates back simply to the date of entry, or to the very origin of the rights of the claimant of the property, is immaterial here to us, though it is different under different circumstances.

In the case of The Calhoun Gold Mining Company v. The Ajax Gold Mining Company, *supra*, which was a case appealed from the Supreme Court of Colorado, and which reversed a long line of decisions in reference to cross lodes, there is an opinion covering some five pages, dealing with rights of the most vital nature, and this Honorable Court, speaking through Mr. Justice McKenna, after determining in favor of the defendant in error in that case upon its contention in reference to crosslodes, makes this statement:

"An assignment of error is based upon an offer of plaintiff in error to prove that at the time of the location of the Ithaca tunnel site no ore had been discovered in

two of the patented claims of the defendant in error, to-wit, the Monarch and the Mammoth Pearl. The ruling was right. The patents were proof of the discovery and related back to the date of the locations of the claims. The patents could not be collaterally attacked. This has been decided so often that a citation of cases is unnecessary."

This is the paragraph upon which, at the trial, the petitioner based its request for a judgment in the present case, and upon which it asks for a reversal of the decision of the Circuit Court of Appeals.

Let it be conceded that patents are proof of a discovery; that patents do relate back to the date of location; that patents cannot be collaterally attacked. On these propositions, as contained in that paragraph, we here make no dispute. But does that paragraph say that the patent is proof of the time or date of a discovery? Does that paragraph mean that the patents relate back to the date of the location, *as shown by the location certificate*, without other proof thereof, and that no other proof can be introduced upon that fact? Does that paragraph mean, when it says that patents cannot be collaterally attacked, that the date of location, when not shown by the patent itself, can not be shown by any other evidence outside of the patent? Unless these questions are answered in favor of the petitioner, the judgment in the Circuit Court of Appeals must stand. Not only would it put a strained meaning upon the words used in that decision, to give them such far-reaching effect, but it would over-ride, not only a prior decision of this Court, to wit: the case of Enterprise Mining Company v. Rico-Aspen Mining Company, *supra*, but it would, without discussion, with no authority, and without the presentation of reasoning therefor, wipe out a line of well established,

thoroughly reasoned decisions, and without any necessity therefor in the decision of the case to the contrary, wherein the question was a pivotal one, where arguments were heard, and the question was determined in the light of its recognized importance. In addition, it would be directly contrary to a learned opinion, rendered by the Circuit Court of Appeals of the Ninth Circuit, rendered by a Court, one of whose members, Mr. Justice McKenna, who writes the opinion in the Calhoun case, *supra*. We refer to The Last Chance Mining Company v. The Tyler Mining Company, 61 Federal Reporter, page 557. This case, upon appeal to this Court, was reversed, but solely upon the question of the admissibility of certain evidence and as to its effect as *res adjudicata*. No criticism is by this Court made upon either the decision or the reasoning of the Circuit Court of Appeals in that case, upon this question of the relation of a patent to the date of discovery. It was a case in which extra-lateral rights were to be determined by priority of location.

Since, as we assert, and as the Circuit Court of Appeals has clearly pointed out, there is a radical difference between the facts of the Ajax-Calhoun case and the case now here for consideration, in essential and controlling matters, the Ajax-Calhoun case must be construed in the light of its own facts, and cannot be applied to the essentially different facts existing in the case at bar. That language may have been employed which might be construed to apply to a case which was not being considered or decided, by ignoring the facts of the case, does not authorize its application thereto, but under the rules announced by this Court we must resort to the facts of the case decided, to get the scope, extent and limits of its application. No Court has made this doctrine so

manifest, applied it more uniformly, or presented with greater precision the doctrine and its reasons, than this Court. Mr. Justice Curtis, in Carroll vs. Carroll, 16 How., 27, states the position of this Court, and which we think is applicable to the discussion now presented, in the following language:

"If the construction put by the Court of a State upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties, and decide to whom the property in contention belongs. And therefore this Court, and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties. In Cohens vs. Virginia, 6 Wheat., 399, this Court was much pressed with some portion of its opinion in the case of Marbury vs. Madison, 1 Cranch, 137, 174. And Mr. Justice Marshall said. 'It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented. The reason of this maxim is obvious. The question actually before the Court is investigated with care and considered in its full extent; other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' The cases of Ex. p. City Bank, 3 How., 292, and Peck vs. Jenness, 7 How., 612, are an illustration of the rule that any opinion given here or elsewhere cannot be relied upon as a binding authority,

unless the case called for its expression. Its weight of reason must depend on what it contains."

Northern Bank vs. Porter Township, 110 U. S., 615;

St. Louis R. Co. vs. Terre Haute, 145 U. S., 404;

United States vs. Wong Kim Ark., 169 U. S., 679.

There is no date contained in the patent to the property of the petitioner other than that of the date of entry, the 5th of August, 1893, which is subsequent to the location of the tunnel site; and if the patent is to be conclusive of the date to which it relates, then we submit it must be to the date of entry, and to the 5th of August, 1892. But if the position be taken that it relates back to the actual discovery, and that proof thereof must be made by evidence, then it is only fair and just that this issue may be met by the opposing party, and that the actual date shall be shown. There is in the patent no reference to the certificate of location, nor anything which could make it a part of the patent itself, ~~nor~~ and if it be granted that a patent relates to the date of location, the question must naturally follow, what is the date of location? Is it the filing of the certificate of location? Is it a date which is recited in the certificate of location? Or is it the date of the actual discovery of mineral?

The discovery of mineral, not the filing of the certificate of location, nor the date recited therein, is the inauguration of a locator's rights.

Revised Statutes of the United States, Sec. 2320.

"No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

Lindley on Mines, Vol. 1, pages 433-4;

Barringer and Adams on Mines and Mining, p. 214;

Erhardt vs. Boaro, 113 U. S., 527;

North Noonday Company vs. Orient Mining Co., 1 Fed., 522;

Jupiter M. Co. vs. Bodie Con. M. Co., 11 Fed., 666;

Cheesman vs. Shreve, 40 Fed., 787;

Overman S. M. Co. vs. Corcoran, 15 Nev., 147;

McLaughlin vs. Thompson, 29 Pac., 816.

No rights of any kind whatsoever were vested in the petitioner, until there was a valid discovery in its two claims, the Ocean Wave and Little Mary. No staking, or posting of signs, or recording of location certificates could take the place of such discovery. Only upon that discovery could there be any relation back to such staking or posting; but the initiation of all right, against either the Government or third parties, is upon the discovery and not the staking, posting or recording of the location certificate.

The filing of the location certificate is the last step required under the Colorado Statutes, is in no manner evidence of title, and is only at the time of its filing a notice of a claim and is not proof of anything mentioned or recited therein as having been done, nor of more than its own filing and contents.

Barringer and Adams on Mines and Mining, p. 239;

Cheesman vs. Hart, 42 Fed., 98.

A location certificate is not required by the United States Statutes, nor by the statutes of all the States; but in those States in which it is required, it is *prima facie evidence only* of its own existence and filing.

Lindley on Mines, Vol. 1, p. 502;

2 Jones on Evidence, Sec. 521;

Campbell vs. Rankin, 99 U. S., 261.

Jantzen vs. Arizona Co., 20 Pac. Rep., 93;

Pollard vs. Shiveley, 5 Colo., 309.

Lindley on Mines, page 502, in treating of this question, says:

"Where such record is authorized, it is *prima facie* evidence only of such facts as are required by law to be stated therein, provided they are sufficiently stated. * * * While many of the States require the date of the discovery to be stated in the recorded certificate, we do not think that this would be evidence of the *fact* of discovery. A discovery once proven, such a record would, *prima facie*, fix the date. The question of discovery is the most important of all the acts required in the proceedings culminating in a perfected location. It is the foundation of the right without which all other acts are idle and superfluous. With the exception of three States (California, Idaho and Montana), the certificate is executed with no solemnity. It is not either acknowledged or sworn to. It is a mere *ex parte* declaration in his own behalf of the party most interested.

* * * * * * *

"The real purpose of the record is to operate as constructive notice of the fact of an asserted *claim* and its extent. When the locator's right is challenged, he should be compelled to establish by proof outside of the certifi-

cate all the essential facts, without the existence of which the certificate possesses no potential validity."

We are seeking here now the date to which the patent relates. It is claimed that it is the date of location. We have, we believe, shown to this Court that the date of location and the origin of such location, is the discovery of the vein, and not the filing of the location certificate. The authorities are numerous that the location certificate is not the proper evidence by which to prove the fact of a discovery.

It is sought by the defendant in error in this case to make a location certificate conclusive proof of the fact of discovery and of the date of the same. If there be force in the rule that such certificate is *prima facie* proof, then, by the very meaning of the words *"prima facie,"* the respondent was entitled to introduce evidence to rebut it, and all evidence upon this point was excluded, over the objection and exception of the respondent by the trial Court. While some degree of sacredness has clung around the patents of the United States, limited, however, by the well considered decisions, in which it has been stated that wherever the United States has issued a patent, without jurisdiction, the patent is of no more validity than any other instrument which confers no rights, we know of no sacredness which clings around a location certificate, made, as has been suggested, by a learned author on mining laws, without any solemnity, an *ex parte* act, made by a party who is the most interested one in the entire course of the location. It would be an absurdity if litigation, in which property of great value is involved, should be determined by the *ex parte* acts of the man who is most interested himself; and that, too, at a time when there was no controversy and no reason to controvert in any manner the facts as set out in the location certificate.

The patent is conclusive only of those facts which are necessary in order to procure its issuance. It is not conclusive of any fact which the Land Department is not called upon to pass on. Without *a* discovery, it would be an impossibility for the Land Department to issue a patent. But the *time of discovery* is not made an essential element in the issuance of it, and cannot therefore be concluded by the issuance. The time of location and the time of discovery is not essential to the issuance of the patent, and is not concluded thereby. As to discoveries made subsequent to a location, while they validate the claim and date back the location, they expressly do so provided no adverse rights intervene.

Morrison's Mining Rights (10th ed.), page 29, and cases cited.

Lindley on Mines, Vol. 1, page 454 and note.

In other words, a patent does not live or die with the location, which is set out in the original application as being the date of discovery. But if discovery is made in the claim at any time before the application for the patent is passed upon and such discovery is proven, a patent may issue therefor, provided the rights of intervening locators are taken care of. So in this case, it is not necessary that this patent relate back to the original date of location, as set out in the certificate of location, in order to give effect to the patent. A patent may live and continue to have force with a date set for the actual discovery of the claim very different from that which is contained in the certificate of location. The question is, after all, one of jurisdiction. A judgment can never in effect exceed the jurisdiction of the Court. If by law the Land Department, which is given the power to issue such patents, has

no right or power to determine the time of location, and if, as in the case of the St. Louis Smelting Company vs. Kemp, 104 U. S., 636, the law is as follows: "Nor is the doctrine of the conclusiveness of the patent inconsistent with the right of the party resisting it to show, if an entry is not stated in the instrument, that no entry of the land is made as an initiatory proceeding;" then we can not escape the conclusion that it is not in contravention of any doctrine of conclusiveness regarding a patent, were a party resisting it to show the date of discovery, and to hold otherwise would be to violate that decision of the Supreme Court.

The doctrine of relation is an equitable one, and will only be applied by a Court of Equity in furtherance of justice to all parties. If our contention is correct, that we are entitled to invoke the law of estoppel against one who knowingly sat by and saw the ~~plaintiff in error~~ Defendant expend upwards of one hundred and twenty-five thousand dollars in the improvement of its property, and under the claim of a right to go through the property belonging to the defendant in error, and made no objection, but acquiesced therein, this is certainly an equity in itself, which may be invoked in favor of the plaintiff in error.

The Circuit Court of Appeals, in Evans vs. Durango Land and Coal Company, 25 C. C. A., 532, referring to this equitable doctrine of relation, said:

"It may be conceded that a patent for public land, has, on several occasions, been held to take effect as of the date of the initial step taken by the patentee, under the laws of the United States, to obtain a title to the land. * * * Nevertheless, there appears to be no hard and fast rule giving a patent effect by relation as of a date anterior to the time when an entry is fully consummated by the payment of the purchase money, or by the doing of

some other equivalent act, such as the surrender of a land warrant, or the selection of land to supply an ascertained deficiency in a land grant. * * * The doctrine of relation is a legal fiction, which was invented and is applied solely for the protection of persons who, without fault of their own, would otherwise sustain an injury. Being of equitable origin, and designed to prevent fraud and injustice, it is a doctrine which is never applied when it would have a contrary effect."

Gibson vs. Chouteau, 13 Wall, 100;

Newhall vs. Sanger, 92 U. S., 766;

Redfield vs. Parks, 132 U. S., 249;

Hussman vs. Durham, 165 U. S., 148.

Small vs. Westchester Fire Ins. Co., 51 Fed., 795;

Hankins vs. Harlan, 68 Cal., 238;

Grant vs. Iowa Land Co., 54 Iowa, 677;

Ellis vs. Pomeroy & Co., 1 Wash., 576.

While petitioner's brief appears to rest its case largely against the Circuit Court of Appeals, upon the claim that the Circuit Court of Appeals held that a junior tunnel location could annul the patent issued for a prior lode location, it manifests some doubt as to the accuracy of this accusation, and seems to consider it necessary to reform this contention, by adding thereto one ingeniously, if not soundly or plausibly, invented for the purpose, and asserts that the entire claim is for a right of way through these lode claims for the tunnel, and this, too, when no blind lodes were found or claimed to have been found therein. This leads to an inquiry as to what rights a tunnel site location has, and upon what they depend. There is no provision in the statute that in order to hold a portion of the tunnel, and to the extent that it may be

excavated, a vein must be discovered therein, or within any given distance therein or from the portal, or that as to the portion thereof not containing or disclosing a blind lode the tunnel is open to location, or the locator loses all his rights therein. The contention of petitioner amounts to this: that while the tunnel right is granted as an entirety, and the right of exploration by means of the tunnel and the ownership and use thereof, is for three thousand feet from its portal, yet if at any time it appears that a blind lode has not been discovered in any part or portion thereof, all title to the tunnel, all right of use thereof, is lost. A test of the propriety of this contention is presented in ascertaining its natural and direct effect. A. locates a tunnel site, extends his tunnel in for a thousand feet, finds blind lodes crossing his tunnel at regular intervals of four hundred feet, in a state in which lode mining claims cannot, as in Colorado, exceed three hundred feet in width. B., relying upon the doctrine of petitioner's counsel here, locates a piece of ground across the course of the tunnel, covering the strip which intervenes between the blind lodes, and between the full width of lode claims located thereon, and having made this location after the location of the tunnel, secures a patent in a proceeding to which the tunnel locator is not a party, and to which he was not permitted to make himself a party. Thereupon portions of the tunnel covering these areas are exsected, and all right to pass through them is taken away; the unity of the tunnel is destroyed; and although the law has authorized operations through it to ground beyond, to the extent of hundreds of feet, this right is lost by a judgment to which its owner was neither party nor privy, and every advantage and inducement granted and held out by the government for the purpose of securing the de-

velopment naturally resulting from the expenditures made in the running of tunnels, is, without process of law or an opportunity to be heard, forfeited. The statute concerning tunnel rights authorizes the running of a tunnel three thousand feet in length. This grant is wholly ineffectual, if its enjoyment must depend upon the discovery of blind lodes in its progress, and if that portion in which blind lodes are actually discovered is made useless by the failure to have discovered others in the preceding portions of the tunnel. The law makes no provision for the surrender, forfeiture, or annulment of segregated portions of the bore of the tunnel, at any time when the tunnel site location, which is always treated as an entirety, has been maintained in compliance with the law. Such doctrine does not merely take part of the tunnel, but in effect takes all of it. The statutes which authorize the location of lode mining claims give to the locator thereof all veins throughout their entire depth the tops or apexes of which lie within the surface boundaries of the claim and the surface of the claim.

United States Revised Statutes, Sec. 2322.

The tunnel does not interfere with surface rights, or the exercise of all the title given with reference thereto, nor does it interfere with the ownership and operation upon the known or outcropping lodes located by others. The two titles are harmonious, they exist without conflict and contemporaneously, and such is the manifest meaning of the statute. There is no argument which can be made for destroying the title to the portion of the tunnel lying between a blind lode and the portal of the tunnel, which is not equally applicable and forcible in destroying the right to the tunnel between discovered

lodes, or between the lodes discovered, and the ultimate breast or farthest end of the tunnel. There is nothing singular or abnormal in a patent being received subject to rights of way in others. This condition exists concededly with reference to veins apexing in another location, and with reference to rights of way for ditches, flumes, roads, etc., all of which interfere more directly with the exercise of the title and estate created by the location and granted by the patent, than the existence of and operation through a tunnel.

U. S. Rev. Stats., Secs. 2340, 2333, 2477, 2322.

The law concerning placer patents excludes therefrom known lodes, although not in terms excepted, unless patent is specifically applied for thereon.

U. S. Rev. Stat., Sec. 2333.

The patent for a placer claim need not expressly exclude a located claim in conflict therewith, nor the lode claim adverse the placer location, yet, since the claim had been segregated from the public domain, it is not included in the placer patent, but as a matter of law in effect, though not in form or words, is excepted therefrom.

Noyes v. Mantle, 127 U. S., 348.

Sullivan v. Iron M. Co., 109 U. S., 550, 554.

Petitioner in its brief has devoted considerable space and rhetoric to what is therein termed an analysis of the opinion of the Circuit Court of Appeals. In this analysis, while interlarding the same with extracts from the opinion, petitioner has plentifully interspersed through it assertions as to the inaccuracy of the Court's views of the

pleadings, alleged misquotations therefrom, disregarding of principles of law and decisions of this Court, a generally wild and lawless course by that Court in reaching its conclusions, the dire results which the brief prophesies will flow therefrom, should not that decision be speedily reversed. The sure, swift and overwhelming refutation of these claims and assertions—we might almost designate them as aspersions—will be found in an investigation of the record and a careful reading of the entire opinion. It will be found that many of the dark, inscrutable results and positions announced to have been disclosed in this opinion, as depicted in the analysis, grow light and reasonable, under the illumination of what the Court in fact said and the real positions it took and the reasons actually announced therefor. A defeated litigant is seldom a fair critic or safe interpreter of an adverse decision, or an impartial judge of its logic, learning and justice. We shall, therefore, leave the decision to make its own reasonable defense against the analysis. The opinion, however, must in fairness be taken in its unity, not in broken and disconnected parts. We need not here repeat the citation of cases referred to in the opinion as the grounds of views of the law therein expressed. A persistent error and misapprehension which runs through petitioner's brief is the statement that the lode claims were first located, that is, were located before the tunnel site was located. This, as we have stated, is not the fact, and what we have desired, and the Circuit Court of Appeals held we had a right to do, was to disprove this contention. There is an allegation to this effect in the complaint, but it is denied in the answer, and the answer affirmatively alleges the contrary. Petitioner's brief desires that its assertion shall be taken as a fact, that it

shall not be permitted to be denied or disproved, and that it shall not be required to establish its denied allegation by sufficient and competent evidence. Making the assertion, it seeks to exclude opposing allegations and proof. It desires that without proof, it shall be sustained against proof. The Circuit Court of Appeals declined to endorse this proposition, this unwarranted assumption; but in so declining gave no warrant for the assertion of petitioner in announcing what it claims the Court held. The ineradicable vice of petitioner's contention is, that it is based upon an assumed but non-existing fact, and that it urges as applicable principles which could only be pertinent after the fact had been legitimately ascertained, but which could not be legitimately invoked in ascertaining whether the fact existed.

ESTOPPEL.

Paragraph 13, P. R., p. 40, alleges the amount of money which has been spent in the prosecution of said work, and which sum of money was spent with the knowledge and acquiescence of petitioner, and is one of the connecting acts and steps relied upon by the respondent in this defense of estoppel *in pais*.

In paragraph 15, P. R., p. 40, it is shown that this tunnel passed entirely through the property of the petitioner at a distance of 1,175 feet from the portal or mouth thereof, and, as it alleged later in the answer, certain property has been located and is owned, and was being worked by respondent, beyond this 1,175 feet, and the last part and portion of paragraph 15 contained on page 7 of the answer, P. R., p 41, again sets up the defense of

estoppel *in pais* against petitioner for its right of way through the property of petitioner for the purpose of working and mining in its property lying beyond.

Paragraphs 16, 17, 18, 19 and 20, P. R., pp. 41-47, each alleges the discovery and ownership of certain lode claims discovered in the tunnel, lying beyond the property of this discovered in the tunnel, lying beyond the property of petitioner, and for each piece of property alleges grounds for a right of way for the mining and operation of same against petitioner.

Regardless of the question of patents or relative rights accorded to lode claims and tunnel claims, the doctrine of estoppel is applicable here, as it is in every case involving rights to property. No matter how absolute the title of petitioner herein to its property and to the Little Mary and Ocean Wave claims, those rights might, by voluntary action or acquiescence, be abridged, modified, or granted to respondent, and if it has, with full knowledge of the work being done and the money expended, allowed respondent to prosecute its work, to use its property both for the purpose of discovery and later of operating the property which was discovered, and of mining it through this tunnel, and if such extensive workings, discoveries and mining were undertaken in reliance by respondent on the acquiescence and permission granted to it by the petitioner, then petitioner is estopped to set up its rights; the defense is a good one.

The general rule is that one who, without objection, suffers another who claims title to enter upon land and make improvements thereon, is estopped from asserting his own title.

Goddefroy vs. Caldwell, 2 Cal., 489; 56 Am. Dec., 360;

McGarrity vs. Byington, 12 Cal., 426;
Eldridge vs. Walker, 80 Ill., 270;
Bullis vs. Noble, 36 Iowa, 618;
Brown vs. Trustees, 37 Md., 108;
Nixon vs. Carco, 28 Miss., 414;
Collins vs. Rogers, 63 Mo., 515;
Evans vs. Snyder, 64 Mo., 516;
Town vs. Needham 3, Paige, 545;
Robinson vs. Justice, 21 Am. Dec., 407;
Chapman vs. Chapman, 59 Pa. St., 214;
Patton vs. McClure, 8 Tenn., 333.

Certain parties conveyed to the United States the privilege to divert so much water from a certain spring as would pass through a pipe of equal diameter with one that conveyed the water to the grantor's premises, the intention being to convey one-half of the water. The distance which the United States wished to carry the water was much greater than to the grantor's premises, which made it necessary to lay larger pipes than those of the other party to obtain one-half the water. The grantors were present when the pipes were laid, and made no objection. Held, that the grantee whose deed conveyed to him one-half of the water, could not claim a different construction of the deed to the government, so as to interfere with the arrangement for conducting the water from such original grantor's premises.

Irwin vs. U. S., 57 U. S. (16 How.), 513, 14 L. Ed., 1038.

Plaintiff knew that defendant claimed the property under a sale made in an equity suit to which he was an

original party. Instead of taking steps to have such sale set aside as a nullity, he, with full knowledge of all the facts, appeared before an auditor and disputed the right of certain creditors to be paid out of the fund which had been raised by such sale, but without raising any question as to its validity. Knowing that defendants' claim rested on such sale, he remained silent while they expended large sums in their improvement, and in effect disclaimed title in himself. Held, that the doctrine of equitable estoppel would apply in favor of defendants.

Kirk vs. Hamilton, 102 U. S., 68, 26 L. Ed., 79.

A mortgagee of a decedent mortgagor was, with the consent of the widow and sole heir, appointed administrator. He foreclosed the mortgage, and bought the property for its full value, and assigned his certificate of sale to defendants, who took in good faith under what they supposed to be a valid judicial sale. The widow and heir assigned her right to redeem to plaintiff, who failed to redeem, and defendants thereafter received a sheriff's deed, and took possession. Held, where defendants had been in possession over three years, and paid the taxes and made valuable improvements with the full knowledge and consent of the widow and plaintiff, that they were estopped from asserting title as against defendants, even though the decree of foreclosure and the sale thereunder were nullities.

Bryan vs. Pinney, 31 Pac., 548.

Where plaintiffs permitted defendant to possess the property as her own for seven years, and make such improvements that the annual rental value was raised from

$800 to $2,500 without notice of plaintiffs' equitable claim, they are then estopped from asserting it.

Gibson vs. Herriot, 55 Ark., 85, 17 S. W., 589, 29 Am. St. Rep., 17.

Where the owner of an unrecorded deed of land permits another to perform work thereon at the instance of one holding himself out as owner, without asserting his title, he will be estopped to deny the title of such other to defeat a mechanic's lien.

Meller vs. Valentine, 3 Colo., 255.

The grantee of a trustee who has purchased property at a foreclosure sale of a trust deed to secure bonds, will be estopped from claiming that an execution sale of the property as that of the original owner, under a judgment in attachment which became a lien on the property prior to the execution of the trust deed, is void for want of proper service in the attachment suit, where the trustee and some of the bondholders knew of such irregularity in the service for many years, without seeking to avoid the sale, while the purchaser on execution was in possession, making improvements, and defending suits involving the title.

Brown vs. Wilson, 21 Colo., 309, 40 Pac., 688.

Where the owner of a grist mill claimed only an equitable right to restrict one owning another lot on the same stream from having another mill on that lot, and permitted, without objection, an expenditure of $2,000 in repairs on the latter mill, it was held that, if he would otherwise have had an equitable right to the easement, yet

he had lost it by standing by and seeing the expenditures made on the property without making objection.

Mitchell vs. Leavitt, 30 Conn., 587.

The fact that a boundary line was in controversy at the time plaintiff, relying upon its location at a certain point, made valuable improvements on his land with the knowledge of defendant and on the faith that defendant would not insist on the survey as later claimed by him, will not prevent an estoppel arising against such defendant from his acts, unless the nature of the controversy was such that it repelled the inference which the party claiming estoppel asserts that he acted on.

Noble vs. Chrisman, 88 Ill., 186.

Where a person without objection suffered one claiming title to land to enter thereon and make improvements, he can not plead that he had forgotten that his deed or title covered the land in controversy.

Bullis vs. Noble, 36 Iowa, 618.

Where a railroad company for many years fails to object to the purchase of land from a county as swamp land, and permits the purchaser to make improvements thereon, it is estopped, though the land is subsequently confirmed to it by the Secretary of the Interior, to deny the title of the purchaser.

Bourne vs. Ragan, 96 Iowa, 566, 65 N. W., 826.

Where plaintiff, after filing a homestead entry on public land, agreed to convey the land, in violation of the homestead act, to defendant, who took possession and made valuable improvements, and, at plaintiff's request,

purchased an outstanding claim of title, plaintiff is estopped from claiming the land under a patent subsequently procured.

McKinnis vs. Scottish-American Mortg. Co., 55 Kan., 259; 39 Pac., 1018.

The plaintiff held land under an equitable title, which by twenty years' adverse possession had ripened into an absolute title. The holder of the record title conveyed a perpetual easement in the land, with the knowledge of the plaintiff, who received the consideration and stood by without objection while large sums were expended in improving the easement. Held, that the plaintiff was estopped from asserting any title as against the easement.

Martin vs. Maine Cent. R. Co., 83 Me., 100, 21 Atl., 740.

The T. Co., owning the E. ½ of the S. E. ¼ of a section, laid out and surveyed thereon, and platted in lots and blocks, a town; the recorded plat and the survey on the ground showing the dividing line between the N. E. ¼ and the S. E. ¼ of the quarter section to be south of block 63. After all the town, except blocks 62 and 63, had been vacated, the L. Co. got title to all the property, and sold to the plaintiff a part thereof, described in the deed as "all that part of the S. E. ¼ of the S. E. ¼," etc., which, on its face, according to a correct survey, would include a strip off the south end of the lots in block 63. At the time of the sale neither the plaintiff nor his grantor supposed any part of the block was included in the conveyance. Thereafter the L. Co. sold lots in the block to defendant, who improved them. Held, that plaintiff, as well as his grantees, was estopped to claim any part of the lots sold to defendant, especially

as, before the purchase by defendant, plaintiff had had survey made, and knew where the true dividing line was, but made no claim on account thereof till the improvements had been made.

Craddock vs. Short, 134 Mo., 449, 35 S. W., 1141.

For a company having an exclusive right of bridge and ferry across a certain river to permit a rival bridge to be erected across it without interposing objection, will estop them from objecting to use of such bridge.

Fremont Ferry & B. Co. vs. Dodge County Com'rs, 6. Neb., 18.

Where a man lies by and permits another to erect works at great expense, and to use them for several years without objection, he is estopped to question the latter's right to use such works in the same manner as they have been before used.

Southard vs. Morris Canal & B. Co., 1 N. J. Eq. (Saxt.), 518.

Where a person entitled to a right in the nature of an easement encourages another, though passively, to acquire title and expend money on the assumption that that right will not be asserted, he will not be permitted in a Court of Equity to assert his right to the prejudice or injury of those who have been encouraged by acquiescence to expend money on the faith that his rights will not be exercised to defeat the just expectations upon which such expenditures have been made. Where such acquiescence has continued for a period of twenty years, or even less, his right is extinguished by estoppel.

Morris & E. R. Co. vs. Prudden, 20 N. J. Eq. (5 C. E. Green), 530.

Where a party purchases land at its full, fair value, and, supposing it to be free from incumbrance, erects buildings of considerable value, and judgment creditors of the former owner of the land, having knowledge that these buildings are being erected, and having reason to believe that it was done under a mistake, by their silence and acquiescence fraudulently encourage him to go on and erect his buildings, they may be restrained by injunction from selling upon execution the buildings erected under their fraudulent acquiescence.

Dellett vs. Kemble, 23 N. J. Eq. (8 C. E. Green), 58.

Where one purchases land from a person whom he knows has granted valuable riparian rights pertaining to it, and valuable improvements have been made on the faith of such grant, he will not be allowed to question the authority to make such improvements.

McCann vs. Oregon Ry. & Nav. Co., 13 Ore., 455; 11 Pac., 236.

The holder of an adverse title to land, and those claiming under him, are estopped to set up such title as against D., where such holder acted for D. in soliciting another to convey to D., knew that D. had purchased and paid for the land believing that the grantor had title thereto, saw D. make extensive improvements on the land, and kept silent as to his own adverse claim.

Wahl vs. Pittsburgh & W. Ry. Co., 158 Pa. St., 257; 27 Atl., 965; 33 Wkly. Notes Cas., 307.

Complainant's grantors, in erecting an addition to their pottery plant, located it by mistake on contiguous

land belonging to defendant. Defendant knew of the erection of the addition, and that it was on its lands. The conveyance to complainant of the pottery plant did not include in its description the land on which the addition was located. Held, that defendant is estopped from disturbing the buildings or removing soil necessary for their support.

Fell vs. Pennsylvania R. Co. (Ch.), 20 Atl., 63.

The defense of estoppel is available at law as well as in equity.

Dickerson v. Calgrove, 100 U. S., 578.

DeGuire v. Lead Co., 38 Fed. 65.

Kirk v. Hamilton, 102 U. S., 68.

Ward v. Cochran, 71 Fed., 131, and cases cited.

The respondent was, under the ruling of the trial Court, certainly deprived of at least two complete and meritorious defenses, namely, that of estoppel and the right to prove the date of location and discovery, and in either event we ask this Honorable Court that the decision of the Circuit Court of Appeals be affirmed.

Respectfully submitted,

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